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No. 07-866

FILED

MAR 24 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

VICTOR SARAVIA-PAGUADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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INTRODUCTION

This Court should grant Petitioner's petition for writ of certiorari to resolve the important issue of whether the time served pursuant to a recidivist sentencing enhancement statute can constitute time served *for* an aggravated felony conviction. In Petitioner's case, this issue arises in the context of analyzing whether the bar to relief from deportation under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (known as "§ 212(c) relief") for aliens who have served over five years in prison[1] applies to Petitioner, given that the time he served pursuant to the sentences he received for his separate aggravated felony convictions totaled less than five years.

The parties do not dispute that Petitioner's incarceration time only exceeds five years if the time served pursuant to the separate recidivist enhancement statute is included in the calculation. The parties also do not dispute that the California recidivist enhancement statute under which Petitioner received an additional three-year sentence in 1992 is a separate offense and does not constitute an aggravated felony. Nonetheless, Respondent argues to this Court that the Court of Appeals committed no error

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[1] This bar was enacted by the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

in holding that Petitioner's three-year enhancement was *for* an aggravated felony conviction.

Petitioner urges this Court to grant certiorari to rule on the important question of the interplay between recidivism statutes and the underlying offenses, and to clearly set forth that recidivism statutes are separate from the underlying offense and that a sentence under an enhancement statute is *not* a sentence for the underlying offense. This Court is currently considering a similar sentencing enhancement issue in the criminal context in *United States v. Rodriquez*, Case Number 06-1646, and should grant the instant petition in order to apply that same analysis in the immigration context.

ARGUMENT

1. Respondent erroneously argues that the "term of imprisonment" that Petitioner served for his status as a recidivist should be included in calculating the total time he has served *for* his aggravated felony convictions. However, that argument is squarely at odds with the plain language of the statute, as well as with the Court of Appeals' own precedent.

Respondent attempts to argue that a sentence under a recidivist enhancement statute is effectively the same as a sentence under a substantive criminal statute. However, on their face, the California state statutory provisions at issue rebut that argument. In 1992, Petitioner was convicted of two substantive

offenses: possession of methamphetamine, in violation of California Health & Safety Code § 11378, and cultivation of marijuana, in violation of California Health & Safety Code § 11358. A conviction under each of these statutes carried a sentencing range of sixteen months, two years, or three years,[2] presumably to allow the sentencing judge to consider the particular factors present in the case in order to determine whether to sentence at high, medium, or low points along that range. Petitioner does not dispute that any amount of time served for his convictions under these statutory provisions would constitute time served *for* aggravated felony convictions.

In addition to the sentences he received as a result of his convictions under the aforementioned conduct-based statutes, Petitioner was also sentenced under California Health & Safety Code § 11370.2, which imposes a separate three-year sentence based on one's *status* as having previously been convicted of an enumerated drug-related crime. As the California state courts have themselves explicitly recognized, such a status-based penalty is entirely distinct from any penalty imposed under the three-tiered sentencing range that the California legislature provided for convictions for the substantive offenses at issue here. *See, e.g., People v. Gokey*, 73 Cal. Rptr. 2d 134, 136 (1998) ("[California Health and Safety Code] section

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[2] Petitioner received the mid-range sentence of two years for the Section 11378 violation and a consecutive sentence of eight months for the Section 11358 violation.

11370.2 ... impose[s] additional punishment for the *status* of the offender, and *not the acts or omissions underlying the current offense.*") (emphasis added); *People v. Walker*, 29 Cal. 4th 577, 582 (2002) ("[R]ecidivist enhancements ... are attributable to the defendant's status as a repeat offender ... [S]uch enhancements are not attributable to the underlying criminal conduct which gave rise to the defendant's prior and current convictions....") (internal quotations and citations omitted). *See also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) ("When analyzing a conviction's maximum possible sentence ... we must separate the recidivist enhancement from the underlying offense, because sentence enhancements ... do not describe substantive criminal offenses.") (internal quotations and citations omitted); *United States v. Moreno-Hernandez*, 419 F.3d 906 (9th Cir. 2005) (under the federal sentencing guidelines, status-based sentencing enhancements cannot be considered in determining the maximum possible sentence for an offense so as to determine whether that offense constitutes a "crime of violence.").

In light of the fact that the substantive statutes at issue provide for a sentencing range to account for the presence or absence of aggravating factors, and in light of the entirely separate status-based sentence imposed under the recidivist statute, it is clear that a distinction must be drawn between penalties for substantive offenses (aggravated felonies) and penalties for status-based offenses (like the recidivism statute at issue here, which all parties agree does not

itself constitute an aggravated felony). Thus, time served pursuant to a recidivist enhancement statute does not constitute time served *for* aggravated felony convictions.[3]

2. In addition, Respondent errs in arguing that it would be difficult to apply Petitioner's analysis in cases where an alien is sentenced to more time in prison than she or he actually serves. In fact, it is not at all difficult as it is merely a matter of calculating what percentage of the alien's sentence was issued under a recidivist enhancement statute, and what amount was issued under a statute describing a substantive, conduct-based offense. For example, if a person received a total six-year sentence that was an aggregate of a three-year sentence for a drug-trafficking conviction (an aggravated felony) and a three-year sentence for a recidivist enhancement (not an aggravated felony), one-half (50%) of the time in prison that the person served would be the time actually served *for* the aggravated felony conviction for purposes of determining whether the IMMACT bar applies.

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[3] Respondent finds no support in his citation to *Gryger v. Burke*, 334 U.S. 728 (1948), in which this Court held, *inter alia*, that imposing a life sentence under the Pennsylvania Habitual Criminal Act was not impermissibly retroactive (because one of the qualifying convictions predated the act's enactment) and did not subject the petition to double jeopardy. This constitutional inquiry is not at all on point to the instant case, which concerns solely the *nature* of the statutes of conviction, and the time served pursuant to those statutes.

Likewise, in Petitioner's case, the record of conviction clearly shows that he was sentenced to a total of 76 months in prison for his 1992 convictions, with 40 of those months having been imposed for his two aggravated felony drug convictions, and 36 of those months having been imposed for a non-aggravated felony (the recidivist enhancement). Because the recidivist enhancement does not describe a substantive offense,[4] the total time that Petitioner served in prison for his aggravated felony convictions should have been prorated and reduced by 47 percent, such that of the 39 months that he served, only 18.3 months could have been properly considered to constitute time served *for* aggravated convictions for purposes of determining whether the IMMACT bar applied to his case. Thus, contrary to Respondent's argument, this is a straight-forward calculation that was well within Congress' intent in specifying that time served in prison may trigger the IMMACT bar *only if* it was time served *for* one or more aggravated felony convictions.

3. Moreover, Petitioner's interpretation of section 212(c) is clearly supported by the Ninth Circuit's own prior decisions in *Toia v. Fasano*, 334

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[4] *See, e.g., United States v. Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002) (en banc) (because a recidivist enhancement does not describe a substantive offense, courts must *only* "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements" in calculating the sentence for an aggravated felony).

F.3d 917 (9th Cir. 2003) and *Samaniego-Meraz v. INS*, 53 F.3d 254 (9th Cir. 1995), *overr'd in part by Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003), as well as by the Sixth Circuit's decision in *Campos v. INS*, 16 F.3d 118 (6th Cir. 1994) and the Board of Immigration Appeals' ("BIA") decision and *Matter of A-A-*, 20 I. & N. Dec. 492 (BIA 1992).

In *Matter of A-A-*, the BIA considered whether the IMMACT bar applies to time served for convictions that occurred prior to the Anti-Drug Abuse Act of 1988 ("ADAA"), Pub. L. No. 100-690, 102 Stat. 4181 (enacted Nov. 18, 1988), for crimes that were only later classified as aggravated felonies by the ADAA. 20 I. & N. Dec. at 502. In conducting the relevant inquiry, the BIA first determined that the underlying conviction for which the alien had served his prison sentence constituted an aggravated felony. *Id.* at 500. Only upon answering that question affirmatively did the BIA proceed to the second part of its inquiry, and determined that the alien had served at least five years in prison *for* that qualifying aggravated felony conviction and was, therefore, statutorily ineligible to apply for § 212(c) relief. *Id.* at 502-03.

Similarly, in *Campos v. INS*, the Sixth Circuit conducted essentially the same analysis to determine whether an alien who was convicted of a controlled substance offense prior to IMMACT, for which he served nearly six years in prison, was subject to the IMMACT bar and rendered ineligible to apply for § 212(c) relief. 16 F.3d at 120-21. The court first determined that the statute under which the alien was

convicted described an aggravated felony offense, and then confirmed that the alien served over five years in prison *for* that aggravated felony conviction. *Id.* ("Mr. Campos' crime clearly falls within this definition of an aggravated felony, and it is undisputed that he served five years and more for the crime.").

Likewise, the Ninth Circuit has also applied that same analysis in determining whether the IMMACT bar rendered an alien statutorily ineligible for § 212(c) relief. In *Samaniego-Meraz v. INS*, the court held that an alien was statutorily barred from § 212(c) relief under IMMACT because: (1) the alien had been convicted of controlled substance offenses, which constituted aggravated felonies; (2) he served seven years in prison *for* those aggravated felony convictions; and (3) it was not impermissibly retroactive to apply IMMACT's amendments to § 212(c) to his pre-IMMACT convictions. 53 F.3d at 255-57. Subsequently, in *Toia v. Fasano*, the Ninth Circuit considered whether, pursuant to this Court's § 212(c) retroactivity analysis in *INS v. St. Cyr*, 533 U.S. 289 (2001), it would be impermissibly retroactive to apply the IMMACT bar to aliens who were convicted by guilty plea prior to the law's enactment. 334 F.3d at 918-19. Again, the court determined that the statute under which the alien was convicted described an aggravated felony under 8 U.S.C. § 1101(a)(43), and that the time he served in prison was *for* that aggravated felony conviction. *Id.* at 918. The court then held that, because under *St. Cyr* it would be impermissibly retroactive to apply the IMMACT bar to an

alien who pled guilty to an aggravated felony prior to the law's enactment, the alien was statutorily eligible to apply for § 212(c) relief. *Id.* at 919-20.

As the above cases make clear, the Ninth Circuit, its sister circuits, and the BIA are all in accord that in order to determine whether the IMMACT bar renders a particular alien ineligible to apply for § 212(c) relief, the following factors must be considered: (1) whether the underlying statute of conviction describes an aggravated felony offense; and, if so, (2) whether the alien served at least five years in prison *for* that aggravated felony conviction. However, in Petitioner's case, the court failed to engage in the proper inquiry. Rather, it appears, it implicitly – and erroneously – found the first step unnecessary, and wrongly concluded that, under the second step, there was no need to distinguish between aggravated felonies and non-aggravated felonies for purposes of the IMMACT bar analysis. This decision has created a conflict among the circuits as to how to conduct a § 212(c) analysis under IMMACT, and is also in conflict with the Ninth Circuit's (as well as the BIA's) own clear precedent on this issue.

Moreover, the Ninth Circuit's decision is contrary to the plain language of the statute as Congress specified that an alien would be barred from relief only if he served five years or more in prison *for* one or more aggravated felony convictions. 8 U.S.C. § 1182(c) (1992). Since it is undisputed that the California recidivism statute does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43), the court's decision

was clearly contrary to the plain language of the statute and must be reversed. Review by this Court is thus warranted, both to resolve these conflicts and to correct the lower court's failure to follow clear Congressional intent.

4. Furthermore, the aforementioned conflict among the circuits and within the Ninth Circuit merits this Court's review because this issue has an extremely far-reaching effect. Contrary to Respondent's argument, this issue is relevant to all aliens who were convicted *at any time* prior to April 1, 1997, *including before 1990*, by jury trial. This is true because this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), and the Ninth Circuit's application of that analysis to pre-IMMACT convictions, extends *only* to convictions attained by plea agreement for which aliens required (and were otherwise eligible for) § 212(c) relief.[5]

5. Finally, as discussed in the petition at 27-29, the question presented in *United States v. Rodriquez*, Case Number 06-1646 (argued Jan. 15, 2008) is substantially similar to the question presented in the instant case and will provide this Court the opportunity

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[5] In *INS v. St. Cyr*, 533 U.S. at 326, this Court held it was impermissibly retroactive to apply the repeal of § 212(c) to aliens who had entered into plea agreements prior to the repeal's enactment. Applying *St. Cyr*, the Ninth Circuit held in *Toia v. Fasano*, 334 F.3d at 919-20, that it would be impermissibly retroactive to apply IMMACT's 212(c) bar to persons who entered into plea agreements prior to IMMACT's enactment.

to apply its holding in *Rodriquez* to the immigration context.

In *Rodriquez*, the Ninth Circuit held that a conviction for a substantive drug-related offense which carried a maximum five-year sentence could not be a predicate drug offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (which required a ten-year sentence), even where the sentence for the underlying conviction was coupled with an additional five-year recidivist enhancement. As should have been the conclusion in the instant case, in *Rodriquez*, the determinative factor for the lower court in deciding whether additional consequences should attach to the conviction was the length of the sentence *only for the substantive offense*, not including any recidivist sentencing enhancements. *United States v. Rodriquez*, 464 F.3d 1072, 1081-82 (9th Cir. 2006). In *Rodriquez*, as in the court's precedent decisions in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) and *Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004), discussed at length in the petition at 17-24, the court never considered any elements of the crime or the "nature" of the crime itself, instead focusing solely on the *length of sentence* that could be imposed *for* the qualifying conviction, which determined whether adverse consequences attached to that conviction. Likewise, in Petitioner's case, the relevant inquiry should only have been the *length of sentence* that was served *for* the aggravated felony conviction, not time served

pursuant to the additional three-year sentence received under the separate recidivism statute.

Although Respondent attempts to distinguish Petitioner's case from *Rodriquez* because *Rodriquez* concerned the *potential* maximum term of imprisonment for aggravated felonies, whereas the instant inquiry concerns the *actual* time served for aggravated felonies, that distinction is of no relevance. Whether considering the potential or actual terms of imprisonment, the only material question is whether a status-based recidivist enhancement statute describes a substantive offense (here, an aggravated felony) for purposes of determining whether time served under that statute is time served *for* a substantive offense (again, here, an aggravated felony). Whether the time could be served or has already been served is of no import – the relevant inquiry is the *nature* of the sentencing statute in both *Rodriquez* as here. Thus, this Court should find that the issue presented in *Rodriquez* is substantially similar to that presented in the instant case, such that review is warranted in Petitioner's case as well.[6] In the alternative and at a

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[6] Respondent also erroneously relies on this Court's decision in *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) to argue that this Court should deny the petition. However, in *Wisniewski*, this Court held that, although it generally does not resolve intracircuit conflicts, an exception is where "the pendency of another case before this Court [raises] the same issue, when certification may be advisable in the proper administration and expedition of judicial business." *Id.* at

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minimum, the Court should hold this petition in abeyance and, after issuing its decision in *Rodriquez*, either request further briefing of the parties to address the effect of *Rodriquez* on the instant petition, or remand the case to the Court of Appeals for a new consideration of the matter in light of *Rodriquez*.

CONCLUSION

For all the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted or held pending *Rodriquez* and considered in light of the Court's determination in that case.

Respectfully submitted,

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March 24, 2008

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902. Here, the pendency of this Court's consideration of *Rodriquez* supports granting the instant petition.